SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 24 1964
JOHN F. DAVIS, CLERK

No. 615

In the

Supreme Court of the United States

OCTOBER TERM 1964

LOUIE A. FALSETTI, Successor Administrator with Will Annexed in the Estate of B. F. GUIDO, Deceased, et al.,
Petitioners,

v.

STELLA MARIE LOWMAN and her husband LAWRENCE GILBERT LOWMAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	Page
Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for granting the writ	5
I. Whether a party may be bound by judgment in which he was dismissed prior to rendition presents an important question of federal due process which should be determined by this Court.	5
II. The decision below raises important problems regarding the application of *Erie* principles and the utilization of abstention.	8
III. The decision below conflicts with the holdings of Texas cases construing and applying an important Texas Civil Statute, Article 1982	10
Conclusion	14

Page

Allan v. Mathews, 210 S.W. 2d 849 11

Bennett v. Bennett, 9 S.W. 2d 758 11

Bernhardt v. Polygraphic Co., 350 U.S. 198, 204 8

Bluitt v. Pearson, 7 S.W. 2d 525 10

Burrage v. Hunt, 147 S.W. 2d 532 (Tex. Civ. App. 1941) 6

East v. Dugan, 79 Tex. 329, 15 S.W. 273 11

French v. French, 148 S.W. 2d 930 11

Hanson v. Denckla, 357 U.S. 235 (1958) 7, 8

Jones v. Gibbs, 133 Tex. 645, 130 S.W. 2d 274 10

Massachusetts Bonding Insurance Company v. Julius Seidel Co., 279 F. 2d 861, 869 (8th Cir. 1960) 8

Rudd-Milikian, Inc. v. Merritt, 282 F. 2d 924, 929 (6th Cir. 1960) 8

State Mortgage Corp'n v. Traylor, 120 Tex. 148, 36 S.W. 2d 449 7

Statutes

Federal

28 U.S.C. Sec. 1254 (1) 2

28 U.S.C. Sec. 1332 3

28 U.S.C. Sec. 1335 ..... 3, 4

State

Tex. Civ. Stat. Art. 1982 ..... 4, 10

Miscellaneous

Vestal, Preclusion/Res Judicata Variables: Parties 50 Iowa L. Rev. 27 (1964) 7

Restatement, Judgments, §79 6

No. .....

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Louie A. Falsetti, Successor Administrator with Will Annexed in the Estate of B. F. Guido, Deceased, and Mrs. Doris (Guido) Falsetti, pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States District Court (Set out Appendix A, *infra*) is reported at 215 F. Supp., 420 (N.D.

Tex. 1963); The opinion of the United States Court of Appeals (Set out Appendix B, *infra*) is reported at 335 F. 2d 632 (5th Cir. 1964).

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 14, 1964, (Tr. 436). The Petition for Rehearing (Tr. 438) was denied on October 2, 1964 (Tr. 482). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the enforcement of a prior judgment in subsequent proceeding by a plea of res judicata against a party who was dismissed before to the rendition of the prior judgment violate federal due process.

2. Should the federal court of appeals, when reviewing a decision of the *federal* district court holding a *state* court judgment void and subject to collateral attack under principles of *state* law, give added weight to the district court's determination of local law and thus refrain from second guessing on such matters, or in interest of skirting federal and state conflicts, stay proceedings pending a suitable suit in state court to determine the validity of the state judgment.

3. Was the state court judgment violative of Texas Civil Statute Art. 1982 and thus void and subject to collateral attack in a federal court proceeding.

STATEMENT

The Petitioner-Administrator on behalf of the Estate of B. F. Guido, deceased, instituted this diversity action to recover oil royalty monies in excess of $10,000 held in suspense by the Defendant-oil companies. The Respondent-Lowmans were joined as Defendants because they also claimed the same monies. R. 18-23.

Subsequently, the Defendant-oil companies pursuant to 28 U.S.C. Sec. 1335 interplead all interested parties to the dispute and deposited the royalty monies into Court. R. 135. The Respondents-Lowman (joined by various interpleaded Defendants) urged various defenses and claims, principally, to wit: (1) That the Lowmans were entitled to the entire fund by res judicata because of a prior state court judgment, (2) that the Lowmans were entitled to the entire fund because the Decedent, B. F. Guido, allegedly had made a contractual will in their favor, and (3) that neither federal jurisdiction, nor proper venue existed. R. 36, 179, 227.

The state court judgment urged that a res judicata purported, among other matters, to impose a construction trust because an alleged contractual will against "the estate of B. F. Guido, deceased, including all property real, personal and mixed, and wheresoever situated." R. 313. The judgment also expressly recited that Doris Guido (now Mrs. Falsetti) was dismissed as successor administratrix because of her removal as such by the probate court. R. 10. No other party was substituted to represent the estate. R. 305-315.

The district court, Judge Sarah Hughes, held (1) that federal diversity jurisdiction existed under 28 U.S.C., §1332

and of the interpleader action under 28 U.S.C., §1335; (2) that venue properly existed in the Northern District of Texas because the suit was transitory in nature and not a local action; (3) that the State Court judgment urged as res judicata was under *State* law void and a legal nullity because on its face it violated the mandatory and jurisdiction requirement of Texas Civil Statute, Article 1982; and (4) that the so-called contractual will did not exist and there is no evidence to establish either that an agreement to make, or an execution of, the so-called contractual will ever occurred. See Appendix A, *infra*. The Findings of Fact and Conclusions of Law are set out at R. 344-357. Because the district court found the state court judgment void under state law that court did not rule whether its enforcement against the Estate would violate federal due process.

On appeal the Fifth Circuit construed Texas Civil Statute Article 1982 to be a mere notice statute and held the state court judgment to be valid. The opinion, though, did not expressly consider the federal due process problem of holding the estate bound by a judgment in which the estate's representative had been dismissed prior to rendition. (See Appendix B, *infra*) In conjuction with rehearing, the petitioner requested the Fifth Circuit, in lieu of giving greater deference to a state court judgment than the judgment would receive under state law, to stay its judgment pending a state declaratory judgment suit. (Tr.) The Court was again urged to consider the application of the rule of several circuits that a trial judge's determination of a local issue of law will not be set aside on appeal unless substantial

authority existed to compel a contrary view. The Court was expressly urged to consider the federal constitutional issue implicit in its opinion. The Petition for Rehearing, Motion to Stay Proceedings Pending State Declaratory Judgment suit and the Motion for Leave for Oral Argument were denied. (Tr. 482).

By way of background, the duly probated will of B. F. Guido, deceased, provided 49% to his surviving widow (petitioner); 49% to the Defendants-Lowman (Respondent Stella Marie Lowman was a step-daughter); and 2% to two designated churches. Under the so-called contractual will (a document never shown to have ever existed—Conclusion of Law 13, R. 356) nothing would go to the surviving widow, but 100% of the oil royalty income would go to the Defendants-Lowman for life (with power to invade the corpus) with remainders over after their death. The void state court judgment (R. 305-315) which the Respondent-Lowmans urged as res judicata sought to enforce the so-called contractual will.*

REASONS FOR GRANTING THE WRIT

I. Whether a party may be bound by judgment in which he was dismissed prior to rendition presents an important question of federal due process which should be determined by this Court.

The state court judgment urged as res judicata purported to impose a construction trust against the entire Estate of B. F. Guido, deceased. The estate representative was dis-

* The Respondent-Lowman and counsel were present for the state summary judgment hearing, but not the surviving widow (Doris Guido Falsetti), R. 305, which perhaps explains why the Respondents prevailed.

missed as a party prior to the rendition of the judgment and no party was substituted, nor attorney ad litem appointed, to represent the Estate. The Court of Appeals held that the Estate, nevertheless, was bound by the judgment and accordingly reversed the findings of the trial court awarding the oil royalty monies to the estate and ordered the monies to be paid to the Respondent-Lowman as they had prevailed in the state suit.

The Restatement of Judgments, §79, p. 359, states the general rule on the effect of a judgment on dismissed parties thusly:

> "A person who originally was a party or who has intervened in the proceeding but who, before judgment, is dismissed from the action, or is permitted to withdraw from it, is not affected by the judgment or by the decision of any issues which have led to it."

Texas appears to be in full accord with the restatement position. *Burrage v. Hunt*, 147 S.W. 2d 532 (Tex. Civ. App. 1941) involved a collateral attack on a judgment by a party who had been dismissed as a party prior to the entry of final judgment. The Texas Court held:

> "In our opinion, this is the first time the validity of the judgment of April 4, 1932, has been squarely before the trial and appellate courts for review. From a careful examination of the entire record herein, we conclude that the judgment of April 4, 1932, is void for the reason that it was rendered by the 44th District Court of Dallas County when that court was without jurisdiction of either the property or persons affected thereby, as is affirmatively reflected by the record in the Adkins case in which said judgment was rendered. This being true, it may be collat-

> erally attacked by any party at any time it adversely affects his interest. *State Mortgage Corp'n v. Traylor*, 120 Tex. 148, 36 S.W. 2d 440, and cases there cited." 147 S.W. 2d at 537.

The conditions and circumstances when the enforcement of a judgment against a party dismissed prior to rendition would violate the federal due process clause appear not to have been discussed previously by this Court. Although the attack on a judgment by a stranger, or a party dismissed prior to judgment, bristles with constitutional due process issues, most commentators have been content to note the existence of such issues and then proceed to discuss the non-due process problems. See, however, Vestal, *Preclusion/ Res Judicata Variables*: *Parties*, 50 Iowa L. Rev. 27, 66 (1964).

The Petitioner contends the dismissal of the Estate's representative prior to rendition precludes on constitutional ground the judgment from being enforced against the Estate. Whether such a judgment being void against the Estate would be void against the decedent's heirs over whom the state court exercised in personam jurisdiction though judgment presents another problem. For example, this Court in *Hanson v. Denckla*, 357 U.S. 235 (1958) considered a collateral attack of a state court judgment. Therein a judgment was rendered in Florida against the beneficiary of a trust, and purportedly against the trustee. The Florida judgment was collaterally attacked in a Delaware proceeding and this Court held no valid in personam jurisdiction was obtained over the trustee, thus the Florida judgment was void and not entitled to res judicata (full faith and credit)

not only as to the trustee but also as to the beneficiaries of the trust who were personally before the Florida Court.

> "Since Delaware was entitled to conclude that Florida law made the Trust Company an indispensable party, it was under no obligation to give Florida any faith and credit — even against parties over whom Florida's jurisdiction was unquestioned." 357 U.S. at 255.

Whether the Estate was an indispensable party under Texas law which would also make the judgment void as to heirs will be discussed, *infra*, under the heading "III The decision below conflicts with the uniform holdings of the Texas courts in construing and applying an important Texas Statute, Article 1482."

II. The decision below raises important problems regarding the application of *Erie* principles and the utilization of abstention.

The district court held the state court judgment to be void under state law. Several Circuits as a sound matter of policy do not overturn decisions of their trial courts in doubtful areas of local state law unless there is substantial authority to compel a contrary view. See, *e.g.*, discussion and cases cited in *Rudd v. Melikian, Inc. v. Merritt*, 282 F. 2d 924, 929 (6th Cir. 1960); and *Massachusetts Bonding & Insurance Company v. Julius Seidel Co.*, 279 F. 2d 861, 869 (8th Cir. 1960). This Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204, expressly commented: "Since the federal judge making these findings is from the Vermont Bar, we give special weight to his statement of what the Vermont law is."

The policy reasons in giving special weight to the trial court's findings would be especially applicable in the case at bar. *The trial Judge, the Honorable Sarah Hughes, prior to her appointment to federal bench was a Texas state court judge well respected for her juristic ability.* There are other sound reasons for the above policy. The superior commission of the circuit judges do not confer greater omniscience in guessing state law. The act of second guessing itself promotes uncertainties and fosters appeals. Indeed, as this Court knows, the Fifth Circuit which does not attach significance to the findings of local law by the trial court is so burdened with appeals that consideration has been given to the creation of an additional court of appeals. Moreover, second guessing accompanied by an over-crowded docket can lead to the dilution of the quality justice required from a court of appeals, which is for all practical purposes a court of last resort. With deference to the fine and conscientious court, in the case at bar the opinion expressly reveals that several important Texas cases were misread. (See discussion under heading III, infra).

The Court of Appeals' opinion also reveals it was concerned with possible federal and state conflicts resulting from the validity of a state judgment being put in issue in a federal proceeding. The extraneous comments that federal courts do not review state court judgments, etc., suggest the Court of Appeals gave greater deference to the state court judgment, whose validity was necessarily raised by a plea of res judicata, than such judgment would receive in state court. If federal and state judicial relations properly

support such contention, then the Court of Appeals at least should stay its opinion pending a state declaratory suit. To give greater deference to the state judgment than it is due under state law, violates the principle underlying *Erie*.

III. The decision below conflicts with the holdings of Texas cases construing and applying an important Texas Civil Statute, Article 1982.

Texas Civil Statute, Article 1982 provides:

> "In every suit against the estate of a decedent involving the title to real estate, the executor or administrator, if any, and the heirs shall be made parties."

The keystone on which the Fifth Circuits opinion rests is thus stated:

> "We are of the opinion that this statute is primarily devoted to the meritorious objective of providing adequate *notice* to all parties * * *" (Tr. 427.)

The statute itself, Article 1982, does not speak of "notice" but requires that they "shall be made parties." Since a federal court would never assume the role of amending a valid state statute the correctness of the decision below must be measured by the Texas cases construing the provision. Not one Texas case contains even a whisper to effect that Article 1982 is primarily concerned with more notice and not substantive joinder. The *rationale decendendi* of Texas cases are directly contrary. The statute is mandatory, *Jones v. Gibbs*, 133 Tex. 645, 130 S.W. 2d 274; the statute is jurisdictional; *Bluitt v. Pearson*, 7 S.W. 2d 525 (Tex. Com. App. 1928). Failure to comply with the statute renders a

judgment void in either a collateral or a direct attack. *French v. French*, 148 S.W. 2d 930; *Bennett v. Bennett*, 9 S.W. 2d 758; *Allan v. Mathews*, 210 S.W. 2d 849; *Bluitt v. Pearson, supra; Jones v. Gibbs, supra;* and *East v. Dugan*, 79 Texas 329, 15 S.W. 273. Under *Erie* principles a federal court may not disregard the above Texas cases. With deference, the position that Article 1982 is a mere notice statute is dead wrong.

"The 'administrator if any' provision has been authoritatively construed by the Texas Supreme Court (Commission of Appeals) to require joinder if administration is pending, or if no administration is pending, if administration is necessary. *Bluitt v. Pearson*, 7, S.W. 2d 525 (Tex. Com. App. 1982):

> "The sole question therefore is whether or not in the absence of an allegation by the Plaintiff that there was no administration on the estate of Mattie Day and no necessity therefor the district court had *jurisdiction* to hear and determine the issues." (Emphasis added). Held, NO."

The administrator, "if any", provision of Article 1982 is not satisfied because the administratrix had at one time been a party. The Texas cases, *without exception*, construe "if any" to require the joinder of the representative of estate if administration is *pending* and if not pending, if necessary. Such construction prevents a frustration of the policy underlying Article 1982 where administration is pending but no administrator has been appointed, or where no administration is pending but administration is necessary. Even the Respondents conceded the statute to be mandatory and did

not question the general rule that violation of a mandatory statute renders a judgment void. *State Board of Insurance v. Betts*, 158 Tex. 612, 315 S.W. 2d 279.

The Texas Supreme Court in a decision that has been constantly followed held that judgment which violated Article 1982 (then Art. 1202) was void and subject to collateral attack. *East v. Dugan*, 79 Tex. 329, 15 S.W. 2d 273. In the *East* case the administrator was joined but not the heirs. The same rule has been applied where the estate was not represented. See *Bluitt v. Pearson*, 7 S.W. 2d 525 (Tex. Com. App. 1928, *French v. French*, 148 S.W. 2d 930; *Bennett v. Bennett* 9, S.W. 2d 758; *Allan v. Mathews*, 210 S.W. 2d 849, and *Jones v. Gibbs*, 133 Texas 645, 130 S.W. 2d 274.

In building its opinion the Fifth Circuit misread two significant Texas cases and rested a strawman argument. First, the Fifth Circuit's opinion states:

> "The district court in its opinion reported in 215 F. Supp. 420, cited no case to the effect that the dismissal of the administrator (trix) renders a judgment against a decedent's estate void. Nor have we been cited any case law to that effect by the Plaintiff (Petitioners)" (Tr. 429)

The trial court's opinion, the Appellee's Brief, both cited and discussed *French v. French*, 148 S.W. 2d 930. In *French* the administrator was initially a party, but died before trial. Apparently no successor administrator was appointed or substituted although the court observed that since the suit sought to impose a trust against the estate because of an

alleged contractual will an administrator was necessary. 148 S.W. 2d at 936-937. *Although the beneficiaries were represented, the Texas court reversed because of the non-joinder of the administrator!*

The appellee-petitioner carefully pointed out the difference between a direct and collateral attack, viz. in a *direct attack* the jurisdictional and mandatory policy underlying Article 1982 is so strong that the failure to allege administration was not pending and not necessary would void the judgment; in a collateral attack the judgment must affirmatively disclose the violation of Article 1982. (See Tr. 453-455)

In the case at bar, the state judgment that was attacked showed on its face that Texas administration in the Estate of B. F. Guido was pending, even gave the docket number. The judgment also on its face showed it was a suit to enforce a contractual will against the estate, which as a matter of law, establishes the necessity for administrator. See trial court's findings, 38, 39, 40, 41. R. 352-353.

The Texas case on which the Fifth Circuit's opinion rests, *Williams v. Tooke*, 116 S.W. 2d 1114, involved a judgment that was completely silent as to either the possible existence of administration or the necessity thereof. (Moreover administration in *Tooke* was not pending nor necessary) A comparison of the judgment attacked in *Williams v. Tooke*, supra, with the judgment concerned in the case at bar decisively demonstrates the inapplicability of *Tooke* and voidness of the judgment herein attacked. See Tr. 456.

Texas Civil Statute, Article 1982 is an important statute. The court below emasculates it by holding it to be a mere notice statute. A result which will cause future federal-state conflicts. For if the lower federal courts follow the circuit's opinion and substitute notice for substantive joinder of the estate, the result will be a federal judgment that under state law would be void.

CONCLUSION

For the foregoing reasons Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Falsetti v. Indiana Oil Purchasing Co.
215 F. Supp. 420 (N. D. Tex. 1963)

HUGHES, District Judge.

This suit was instituted by Louie A. Falsetti, as successor administrator with will annexed of the Estate of B. F. Guido, deceased, against the Indiana Oil Purchasing Company, Pan American Petroleum Company, Stella Marie Lowman and her husband, Lawrence Gilbert Lowman, and John (Johnnie) Frank, Trustee, to recover for the Estate of B. F. Guido, deceased, certain oil royalty payments in excess of $10,000.00 held in suspense by the Defendant oil companies.

Doris C. M. Falsetti, formerly Doris C. M. Guido, joined by her husband, Louie A. Falsetti, in his individual capacity rather than his representative capacity, intervened seeking judgment that the funds on deposit be paid to the Plaintiff-Administrator.

Plaintiff-Administrator, in his complaint alleges that the Defendants, Stella Marie Lowman and her husband Lawrence Gilbert Lowman and John (Johnnie) Frank, Trustee, were claiming the funds in possession of the Defendant oil companies by virtue of a judgment of the District Court of Brazoria County, Texas, purporting to impose a constructive trust against the Estate of B. F. Guido, deceased, upon all assets of the estate.

Defendants, Stella Marie Lowman and her husband, Lawrence Gilbert Lowman, and John (Johnnie) Frank, Trustee,

filed a counter-claim seeking the funds held in suspense based upon the aforesaid judgment in the District Court of Brazoria County, Texas, rendered September 18, 1960, in their favor, purporting to decree an agreement on the part of B. F. Guido, deceased, to execute a mutual will with his former wife, Dora Frank Guido, and to enforce the constructive trust under such mutual will upon all the assets of the Estate of B. F. Guido, deceased.

Plaintifff-Administrator alleges that this judgment was a nullity because the administrator of the Estate of B. F. Guido, deceased, was not a party to the judgment and that there was no agreement to execute mutual wills.

Plaintiff and Intervenors are citizens of the State of California. The individual Defendants are citizens of Texas. Defendants, Pan American Petroleum Company and Indiana Oil Purchasing Company, incorporated under the laws of Delaware and Nevada respectively, are licensed to do business in Texas and are doing business in the Northern District of Texas.

The oil companies upon proper plea and order of court paid all funds into the registry of the Court. Their answer admitted that the funds involved were derived from royalty interests in the lands belonging to the Estate of B. F. Guido, deceased. Interpleader was properly invoked under 28 U.S.C. §§ 1335, 1397 and 2361.

The essential facts are as follows: Plaintiff-Administrator, Louie A. Falsetti, was appointed and duly qualified as successor ancillary administrator with will annexed of the Estate

of B. F. Guido, deceased, in the Probate Court of Brazoria County, Texas, and was duly authorized and empowered to institute this suit by said court.

Plaintiff-Intervenor, Doris C. M. Falsetti, is the former Doris C. M. Guido, surviving widow of B. F. Guido, deceased, and presently the wife of Louie Falsetti.

Dora Frank Guido, mother of the defendant, Stella Marie Lowman, and B. F. Guido were legally married on July 31, 1929, and remained husband and wife until the death of Dora Frank Guido in 1949.

On or about May 31, 1934, Dora Frank Guido and her husband, B. F. Guido, executed an oil, gas and mineral lease to Gillette Hill covering the Brazoria County property involved in this law suit and alleged to be assets of the Estate of B. F. Guido, deceased. The lease is now owned and held by the Defendant, Pan American Petroleum Corporation under and by virtue of mesne assignments.

On December 3, 1942, Dora Frank Guido executed her last will and testament, leaving all her property, both real and personal, to her husband B. F. Guido. This will provided, inter alia, "This will is made in consideration of the making on this same day by my husband, B. F. Guido, of a will with the same terms and provisions, and it is our intention to create a trust estate as herein provided for the benefit of Mrs. Stella Marie Lowman and her husband, after her death, and for the distribution of the trust estate after termination of the trust in the manner and terms herein set forth."

On or about September 16, 1949, Dora Frank Guido died in Houston, Harris County, Texas, survived by her husband, B. F. Guido, and her daughter, the Defendant, Stella Marie Lowman. On or about October 27, 1949, the surviving husband, B. F. Guido, caused the will of Dora Frank Guido to be probated in the Probate Court of Harris County, Texas, and on or about January 11, 1950, an order was entered admitting said will to probate, appointing B. F. Guido as independent executor of said estate without bond. B. F. Guido duly qualified as the law required.

On or about April 21, 1951, B. F. Guido married Doris C. M. Guido (now Falsetti) Plaintiff-Intervenor. On or about July 3, 1951, B. F. Guido executed his last will and testament leaving 49% of his property to his wife, Doris C. M. Guido, 49% to the Defendant, Stella Marie Lowman, and 1% to each of two Roman Catholic Parish Churches.

B. F. Guido died in Los Angeles County, California, on or about June 14, 1957. At the time of his death he was a resident of Orange County, California. The will of B. F. Guido, deceased, was admitted to probate in the Superior Court of Orange County, California, and Plaintiff-Intervenor, Doris C. M. Guido Falsetti, was appointed administratrix with will annexed. On January 14, 1959, she was appointed ancillary administratrix with will annexed in the County Court of Brazoria County, Texas, and qualified as the law required.

The judgment in question in this case was the result of a suit instituted in the District Court of Brazoria County, Texas, by Stella Marie Lowman and her husband, Lawrence

Gilbert Lowman, against Doris C. M. Guido, individually and as Administratrix with will annexed of the Estate of B. F. Guido, deceased, and others seeking to establish an alleged agreement on the part of B. F. Guido, deceased, to execute a mutual will and to impose a trust upon all assets of the Estate of B. F. Guido, deceased, in favor of Stella Marie Lowman and her husband, Lawrence Gilbert Lowman, in accordance with the provisions of the alleged agreement and under the terms of the alleged mutual will. On September 16, 1960, the District Court of Brazoria County, Texas, entered judgment purporting to enforce the alleged contractual will and to impose a constructive trust upon all property of the estate, which included the land leased by the two oil company defendants.

Originally the Administrator of the Estate of B. F. Guido was a party, but prior to judgment, on motion of Plaintiff Lowman the case was dismissed as to Doris C. M. Guido, in her capacity as administratrix of the Estate of B. F. Guido, deceased, in the Superior Court of Orange County, California, and also in her capacity as Administratrix of the Estate of B. F. Guido, deceased, in the County Court of Brazoria County, Texas.

Neither the judgment nor the pleadings in the Brazoria County District Court case contain any allegation or statement that no administration was pending on the estate of B. F. Guido, deceased, or that administration was not necessary. In fact the judgment shows on its face that administration on the Estate of B. F. Guido, deceased, was still pending in the Superior Court of Orange County, California, and

ancillary administration was still pending in the County Court of Brazoria County, Texas.

With respect to the issue as to whether there was a mutual will executed by B. F. Guido, no document purporting to be a will was introduced in this case nor was there any evidence that such a will was ever in existence. There was no evidence of an agreement to make a mutual will other than the aforesaid language contained in the will of Dora Frank Guido.

This Court has jurisdiction over the subject matter and the parties by reason of diversity of citizenship and the amount involved being in excess of $10,000.00.

It is the contention of the Defendants Lowman that Plaintiff Falsetti has no power to sue in the federal court as a foreign administrator. He is, however, a citizen of California and his appointment as administrator in California and in Texas does not rob him of his citizenship. In McWilliams v. Dawson, et al., 48 F. Supp. 538, Northern District of Texas, the Court said that an administratrix who was a resident of Oklahoma although appointed by the Probate Court in Texas, is not robbed of her citizenship by reason of such. She is still a resident of Oklahoma and is entitled to sue in this court. "Residence rather than [her] appointment is the determining factor in diversity."

In *Mecom v. Fitzsimmons Drilling Company*, 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A.L.R. 904, the United States Court said:

> "It is settled that the federal courts have jurisdiction of suits by and against executors and administrators

> if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship."

Defendants Lowman also contend in their motion to dismiss that this is a suit for settlement and distribution of a deceased's estate and a matter of state probate jurisdiction rather than federal jurisdiction. Plaintiff-Administrator's complaint, however, to recover funds in the hands of the oil companies as well as Defendants' cross-action to have a contractual will established are civil actions and not an ex parte probate matter.

In the case of *Ellis v. Davis*, 109 U.S. 485, 3 S. Ct. 327, 27 L. Ed. 1006, the Supreme Court of the United States said:

> "Jurisdiction as to wills, and their probate as such, is neither included nor excepted out of the grant of judicial power to the courts of the United States. So far as it is ex parte and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties."

This being a controversy between citizens of different states, involving more than $10,000.00 this Court has jurisdiction. The judgment, which the Lowmans seek to uphold in this court, was rendered by a district court of the State of Texas and not by a probate court.

As a third ground for dismissal Defendants contend this case is a proceeding to set aside a State Court judgment of citizenship and the amount involved is more that

and the remedy is by bill of review in the state district court or appeal to the state appellate court. Plaintiffs, however, contend the judgment is void and where there is diversity of citizenship and the amount involved is more than $10,000.00 federal courts have full power over suits attacking void state court judgments. In *O'Boyle v. Bevil*, 259 F. 2d 506, 512, the Fifth Circuit said:

> "When, as is true in Texas, a judgment can be set aside for want of jurisdiction or for fraud, the federal court, exercising its equity jurisdiction, can act similarly in a diversity case."

Professor Moore has aptly characterized the power of a court to entertain a collateral attack upon a void judgment as follows:

> "A void judgment, state or federal, may be collaterally attacked, i.e. its nullity and ineffectiveness asserted at any time, in any proceeding where the validity of the judgment comes in issue and is appropriately challenged. * * *
>
> "The principal underlying collateral attack is that since the judgment is void, the attacking party need show no 'equities' or 'merits' in this favor, these are irrelevant, for if the court now adjudges the judgment to be void, it is merely recognizing and declaring that which already existed." 7 Moore's Federal Practice Sec. 60.41 [1] (2nd ed. 1955)

The preceding three questions with respect to jurisdiction were raised by the defendants in a motion to dismiss. The contentions being without merit the motion was denied.

The two principal questions on the merits are (1) is the state judgment void and (2) did B. F. Guido make an

agreement to execute a mutual will and in fact execute such a will?

With respect to the first question, it is Plaintiff's contention that the state judgment is void and the money from the leases on the land belonging to the Estate of B. F. Guido, deceased, should be paid to the executor, Louie F. Falsetti. It is Defendants' contention that the state judgment is valid, and since said judgment established an agreement between Dora Frank Guido and B. F. Guido for mutual wills and vested title to land and other property belonging to the Estate of B. F. Guido, deceased, in beneficiaries according to said mutual will, the money from the leases in question should be paid to the beneficiaries of the mutual will established by the state judgment.

It affirmatively appears that the suit instituted in the District Court of Brazoria County, Texas, involved title to real estate in which the Estate of B. F. Guido claimed an interest. The administrator of such estate was not a party to said judgment although administration was pending not only in the State of California but also ancillary proceedings were pending in the County Court of Brazoria County, Texas.

Without the administrator a valid judgment could not be rendered. Art. 1982, Vernon's Civil Statutes of Texas, provides:

> "In every suit against the estate of a decedent involving the title to real estate, the executor or administrator, if any, and the heirs shall be made parties."

The requirement of the statute is mandatory. *Jones v. Gibbs*, 133 Tex. 645, 130 S.W. 2d 274, *Allen v. Matthews*, 210 S.W. 2d 849 (Tex. Civ. App. 1948) error ref. n.r.e., *East v. Dugar*, 79 Tex. 329, 15 S.W. 273.

The case of *French v. French*, 148 S.W. 2d 930 (Tex. Civ. App. 1941) error dismissed, judgment correct, was a suit involving title to real estate of a decedent in which no representative of the estate was a party. The defect in the parties was held fatal, the Court saying at pages 936 and 937:

> "Upon the death of Sarah Ann French, Charles E. French and Kathleen French asserted the right of the exclusive possession of part of the lands herein involved. Who might authoritatively question that right? Manifestly, the legal representatives of Sarah Ann French might do so; the heirs of Sarah Ann French might do so, if there was no administration and no necessity therefor. Suppose this judgment be affirmed, would it be binding on her legal representatives? As such they never had their day in court.
>
> "The heirs cannot recover property unless there be a showing made that no administration is pending on the estate of the intestate and no necessity therefor. We think that suit cannot be maintained against an heir for the recovery of real estate without a showing that there is no administration and no necessity therefor."

In the case of *Bluitt v. Pearson*, 117 Tex. 467, 7 S.W. 2d 524, by the Commission of Appeals, it was held that in a suit by certain heirs of one deceased against other heirs involving right to property Plaintiff's petition must allege that there was no administration of decedent's estate and no necessity for one.

In *Bennett v. Bennett*, 9 S.W. 2d 758 (Tex. Civ. App., 1928) suit was instituted to recover an interest in real estate. The Court said:

> "In the amended pleadings on which they went to trial, appellants alleged that F. M. Bennett had died, leaving a will, and that his wife, Orlena Bennett, had been appointed independent executrix of said estate. They alleged that the F. M. Bennett estate and Orlena Bennett as independent executrix were made parties defendant. The record shows, however, that there was no service upon either the F. M. Bennett estate or Mrs. Bennett as independent executrix, and the judgment does not in any way dispose of said parties. This is such fundamental error apparent of record as will necessitate a reversal of the case. Under the Revised Statutes of Texas as well as the unbroken line of authorities, it is essential in a partition suit, or in a suit against the estate of a decedent involving the title to real estate, for the executor or administrator, if there is one, to be made a party. Article 1982, Revised Statutes * * *."

The net result of the state court case was to impose a constructive trust in favor of a step-daughter to the exclusion of the surviving widow upon the entire assets of the Estate of B. F. Guido, deceased, contrary to the express provisions of decedent's last will when no representative of the pending estate was before the court. Such a judgment does not bind the estate and is void.

Since the judgment is void for want of an indispensable party it can be collaterally attacked. It is basic that a void judgment has no effect whatsoever and can be attacked in any court in any proceeding. In *Switzer et ux v. Smith*,

Tex. Com. App., 300 S.W. 31, 68 A.L.R. 377 the Commission of Appeals has this to say:

> "[I]f the judgment was void, rather than voidable, its validity could be questioned in any court in any proceeding whenever a right was asserted under it."

The judgment of the state court being void it becomes necessary to consider the question of whether B. F. Guido, deceased, agreed to execute a mutual will. Defendants would have this court decree that B. F. Guido entered into an agreement to execute such a will without any evidence except the ex parte statement contained in the will of Dora Frank Guido, heretofore set out in the statement of facts. Defendants offered no other evidence which would in any way establish a so-called contractual will or an agreement to execute such.

In the case of *Pullen v. Russ*, 226 S.W. 2d 876 (Tex. Civ. App.) error ref. n.r.e. husband and wife executed wills on the same day containing identical provisions. It was contended that these provisions were sufficient, by themselves, to show that they were executed pursuant to a contract. The Court overruled the contention holding:

> "The recital that the other spouse was executing a similar will did not make the wills contractual because it was no more than the statement of a fact which, under the decided cases, was not enough to make the wills contractual."

In the case of *Wagnon v. Wagnon*, 16 S.W. 2d 366 (Tex. Civ. App.) writ ref., the court in holding identical wills executed on the same day not mutual said,

> "The general rule, however, appears to be that such wills, in the absence of recital that same are made pursuant to a contract, are not in themselves sufficient evidence of an enforceable contract between the testators to make same enforceable in equity."

In the cited cases both wills were in existence, whereas in the present case there is merely a recital in the will of Dora Frank Guido. It is clear that the mere making of a joint or mutual will does not of itself prove that it was made pursuant to a contract. The agreement must be proved in order to bind the survivor.

In *Nye v. Bradford*, 144 Tex. 618, 193 S.W. 2d 165 at pages 167 and 168, 169 A.L.R. 1, the Supreme Court of Texas said:

> "One who relies upon a will as a contract has the burden of proving that the will is contractual as well as testamentary in character * * * It is held that the mere making of a joint will does not of itself prove that it was made pursuant to contract."

In the case at bar there is a complete lack of evidence of any agreement on the part of B. F. Guido to execute a mutual will, the recitation in the will of Dora Frank Guido being ex parte and not binding on her husband.

It is the contention of the Defendants Lowman that the will by which B. F. Guido acquired the property imposed upon him the duty to create a trust for Mrs. Lowman. But this contention is answered by the fact that Dora Frank Guido gave her husband an absolute fee simple estate in her property. He therefore had the right to dispose of it

as he saw fit. The pertinent provision of her will with respect to such disposition is follows:

> "2. It is my desire, and I so direct, that all of my property, both real and personal, of which I may die seized and possessed, whether the same be my separate property or a part of the community estate of my beloved husband, and myself, after the payment of my just debts, together with all of the expenses incident to probating this will, shall pass to and vest in fee simple in my beloved husband, B. F. Guido, and after payment of all my just debts, I give, bequeath and demise to my beloved husband, B. F. Guido, all the rest, residue and remainder of my property, real, personal or mixed, wherever the same may be situated, I may now own or be interested in at the time of my death, in fee simple, to manage, sell or dispose of as he may wish or see proper."

The will did not purport to dispose of the property of B. F. Guido. According to the following cases under such circumstances, B. F. Guido made no election by accepting the property under the will nor does any estoppel arise by reason of his acceptance.

In the case of *Graser v. Graser*, 147 Tex. 404, 215 S.W. 2d 867, 870 the Supreme Court of Texas held that a fundamental prerequisite for the application of the rule that an owner may by express or implied election to take under the will cause his property to be treated as if it had passed by the will,

> "is that the will shall purport to dispose of the property which the testator does not own. If it does not do so, there is plainly no basis for an election, and a beneficiary under the will may accordingly take whatever the will affords without any equities arising

> against his own property. It is also prerequisite that as to the testator's intent to dispose of property he does not own, the will shall 'be open to no other construction', because 'The law presumes that no man will attempt a testamentary disposition of the property of others.'"

In the case of *Wright v. Wright*, 154 Tex. 138, 274 S.W. 2d 670 the Supreme Court said:

> "In determining whether the will disposes of property of the beneficiary, the rule is, of course, that it does not so dispose unless it is 'open to no other construction.'"

It follows therefore that since the state court judgment was void and there was no evidence of a contractual will and no estoppel, the money received from the leases held by the Defendant oil companies belongs to the Estate of B. F. Guido, deceased, and the claim of Plaintiff-Administrator to such monies should be sustained and the counterclaim of the Defendants Lowman seeking to assert an alleged contractual will of B. F. Guido, deceased, should be denied.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20471

STELLA MARIE LOWMAN and her husband, LAWRENCE GILBERT LOWMAN, et al.,

Appellants,

v.

LOUIE A. FALSETTI, Successor Administrator with Will Annexed in the Estate of B. F. GUIDO, Deceased, et al.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(August 14, 1964.)

Before TUTTLE, Chief Judge, BROWN and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: This appeal requires us to determine the validity of a Texas State Court judgment which was successfully attacked by plaintiffs Falsetti (appellees) in a collateral proceeding brought in the United States

District Court for the Northern District of Texas. The District Court concluded as a matter of law that the judgment of the State District Court was void and subject to collateral attack. *Faisetti v. Indiana Oil Purchasing Co.*, 215 F. Supp. 420 (D.C. N.D. Tex. 1963). The controversy concerns the title to certain land situated in Brazoria County, Texas.

This suit was filed by plaintiffs Falsetti, et al. against Stella Marie Lowman et vir., Indiana Oil Purchasing Company, Pan American Petroleum Corporation,[1] and John (Johnnie) Frank, Trustee, to recover royalty payments held in suspense by defendant oil companies. The controlling issue is whether the state court judgment was rendered in violation of Article 1982, Vernon's Civil Statutes Annotated.[2] We disagree with the District Court and hold the state court judgment valid.

The following statement of facts, although somewhat lengthy, is requisite to a complete understanding of the various technical questions involved. On July 31, 1929, Dora Frank Guido and B. F. Guido were legally married and remained husband and wife until her death in 1949. By warranty deed dated February 27, 1934, B. F. Guido conveyed to his wife, Dora Frank Guido, an undivided one-half

[1] Defendants Pan American Petroleum Corporation's and Indiana Oil Purchasing Company's first amended answer and bill of interpleader establish that they are mere stakeholders and assert no claim to the royalty monies.

[2] "Art. 1982, V.C.S.A. 1837, 1198, 1202 For lands against decedents.

In every suit against the estate of a decedent involving the title to real estate, the executor or administrator, if any, and the heirs shall be made parties defendant. Acts 1870, p. 173; G.L. vol. 6, p. 347; P.D. 5697."

interest in and to the land involved, located in Brazoria County, Texas. This land and the mentioned royalty payments are the chief if not the only remaining assets of either of the Estates of Dora Frank Guido or B. F. Guido. The other one-half interest is owned by certain other persons and is not here involved.

On May 1, 1934, Dora Frank Guido joined by her husband, B. F. Guido, et al., executed an Oil, Gas and Mineral Lease covering the Brazoria County property, which lease has been at all times from the date of its execution until the present time and is now a valid and subsisting lease owned and held by defendant Pan American Petroleum Corporation under and by virtue of mesne assignments. Since about 1937 there has been production of oil or gas from the property.[3]

On September 16, 1949, Dora Frank Guido died testate survived by her husband, B. F. Guido, and by her only child and sole heir, defendant Stella Marie Lowman. Insofar as here material, Dora Frank Guido's Last Will and Testament, dated December 3, 1942, devised the residue of her estate to her husband, B. F. Guido, but in the event he predeceased her or in the event of their contemporaneous deaths, it devised her entire estate in trust with directions to the trustees to pay the entire income therefrom to her daughter, Stella Marie Lowman, for her life, and thereafter, under certain circumstances, to Lawrence Gilbert Lowman, the daughter's husband, for his life, with one-half of the

[3] The United States District Court directed that certain funds derived from the production of oil on the land involved be paid over to the plaintiffs.

remainder to her collateral heirs and the other one-half to B. F. Guido's collateral heirs. The will contained this further provision:

> "(8) This WILL is made in consideration of the making on this same day, by my husband, B. F. Guido, of a will with the same terms and provisions, and it is our intention to create a TRUST ESTATE as herein provided for the benefit of Mrs. Stella Marie Lowman and her husband, after her death, and for the distribution of the Trust Estate after termination of the Trust in the manner and terms herein set forth."

The application of B. F. Guido to probate the said will was granted, and on January 11, 1950, the will was admitted to probate. B. F. Guido was appointed independent executor without bond. He took possession of the entire estate and appropriated it to his own use and benefit. He did not account to anyone for any of the said estate, but received and accepted the benefits under the will during his lifetime.

B. F. Guido subsequently married Doris C. M. Guido (now Doris C. M. Falsetti, and one of the plaintiffs herein) in April, 1951. In June 1957, B. F. Guido died testate while a resident of California. A will of B. F. Guido, dated July 3, 1951, referred to as the "subsequent will" was admitted to probate in California, and the plaintiff Doris C. M. Falsetti was appointed administratrix with the will annexed. This subsequent will in effect devised forty-nine percent (49%) of his estate to plaintiff Doris C. M. Guido Falsetti, forty-nine percent (49%) to the defendant Stella Marie Lowman, and one percent (1%) to each of two Roman Catholic Parish Churches.

Plaintiff Doris C. M. Falsetti filed exemplified copies of B. F. Guido's subsequent will and the foreign order of probate and letters of administration in Brazoria County, Texas. In December 1958, orders in the ancillary proceeding in B. F. Guido's estate were entered which admitted the will to probate and appointed plaintiff Doris C. M. Falsetti, Administratrix with will annexed. Mrs. Falsetti was removed as Ancillary Administratrix upon motion by Stella Marie Lowman in February 1960. The action in the Texas State Court which led ultimately to the judgment now under scrutiny was filed in September 1958, by Stella Marie Lowman et vir. against Doris C. M. Guido, et al. A final judgment was rendered by the District Court of Brazoria County, Texas, dated September 16, 1960, and entered on October 18, 1960.[4]

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[4] Only those parts of the judgment as are here relevant are set out.

"In the District Court of Brazoria County, Texas.

Stella Marie Lowman, et vir,

v. No. 39,247.

Doris C. M. Guido et al.

Final Judgment."

"On this the 16th day of September, 1960, came on to be heard in its regular order in the above entitled and numbered cause Plaintiffs' Motion for Summary Judgment."

* * * * *

"The Plaintiffs in open Court dismissed the above entitled and numbered cause as to the Defendant Doris C. M. Guido in her capacity as Administratrix with Will Annexed in the Matter of the Estate of B. F. Guido, Deceased, No. A-29641 in the Superior Court of the State of California in and for the County of Orange, and also in her capacity as Administratrix With Will Annexed in the Ancillary Administration of the Estate of B. F. Guido, Deceased, No. 5626 in the County Court of Brazoria County, Texas, for the reason she has been removed as such Ancillary Administratrix.

"Whereupon, the Court, having duly heard and considered the pleadings of the parties, Plaintiffs' Motion for Summary Judgment and Affidavit and Exhibits attached thereto, admissions of the Defendants and argument of counsel, is of the opinion that there is no genuine issue as to any material fact and that the Plaintiffs

In November 1960, plaintiffs Louie A. Falsetti and Doris

Stella Marie Lowman and husband Lawrence Gilbert Lowman are entitled to judgment as a matter of law, the Court finding as follows: That it has jurisdiction of the parties to and subject matter of the above entitled and numbered cause; that all citations and notices required by law in connection with Plaintiffs' suit have been duly served or given in the manner and form and for the length of time prescribed by law; that this is properly a class action and that all of the Defendants named in the fourth (4th) and fifth (5th) paragraphs of this Judgment having appeared in the above entitled and numbered cause constitute and are representative of a class of remaindermen whose rights are common under the contract by virtue of reciprocal and mutual wills of Dora Frank Guido, deceased and B. F. Guido, deceased, hereinafter enforced and established by this Judgment and that all of said Defendants named in said fourth (4th) and (5th) paragraphs of this Judgment fairly insured the adequate representation of the entire class of remaindermen both in number and in interest; that on or about July 31, 1929, Dora Frank Guido and B. F. Guido were married to one another and remained husband and wife until the death of Dora Frank Guido on or about September 16, 1949; that Dora Frank Guido died on or about September 16, 1949; leaving a written Last Will and Testament, dated December 3, 1942, now of record in Vol. 702, Page 527 of the Deed Records of Brazoria County, Texas, reference to which will and the record thereof is here made for all purposes, which will expressly provided that 'This Will is made in consideration of the making on this same day by my husband, B. F. Guido, of a will with the same terms and provisions, and it is our intention to create a Trust Estate as herein provided for the benefit of Mrs. Stella Marie Lowman and her husband, after her death, and for the distribution of the Trust Estate after termination of the Trust in the manner and terms herein set forth,'; that B. F. Guido offered or caused to be offered for probate said will of Dora Frank Guido in Cause No. 44415, in the County (Probate) Court of Harris County, Texas, was appointed executor thereof in the order of probate of said will entered by said Court, was issued letters testamentary as such executor, took possession of said estate as such executor, and received, appropriated and accepted the benefits under said will; that B. F. Guido never repudiated or revoked the agreement and the contract by virtue of reciprocal and mutual wills of Dora Frank Guido, deceased and B. F. Guido hereinafter enforced and established by this Judgment either at or prior to the death of Dora Frank Guido, deceased; that the will of Dora Frank Guido, deceased, dated December 3, 1942, was the result of an agreement between the said Dora Frank Guido and her husband B. F. Guido, is contractual in its nature and such agreement is evidenced by said will itself; that said will of Dora Frank Guido, dated December 3, 1942, is a written contract and agreement executed by her and in consideration of the making on the same date by B. F. Guido of a will with the same terms

C. M. Guido were married, subsequent to the entry of the state court judgment now under attack. In May 1961,

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and provisions with the avowed intention to create a trust estate for the benefit of the Plaintiffs and for the distribution of the trust estate eventually to remaindermen, many of whom are Defendants herein, in the manner set forth in said will; that B. F. Guido in offering or causing to be offered for probate said will, in accepting the appointment of executor thereof, in accepting Letters Testamentary, in receiving, appropriating and accepting the benefits under said will and by virtue of the contract expressed in said will, or for any one or more of such reasons, became thereby irrevocably bound by said agreement and contract to dispose of his estate, real, personal and mixed, at his death in accordance with and in the same manner as provided by the terms and provisions of said agreement and contract evidenced by the will of Dora Frank Guido, deceased, that is, leaving his estate in trust upon the same terms and for the same uses and benefits as provided therein; that B. F. Guido in offering or causing to be offered for probate said will, in accepting Letters Testamentary, in receiving, appropriating and accepting the benefits under said will and by virtue of the contract expressed in said will, or for any one or more of such reasons, is estopped to assert that there was not an agreement and contract with Dora Frank Guido to have his estate, real, personal and mixed, at his death pass in accordance with and in the same manner as provided by the terms and provisions of said agreement and contract evidenced by the will of Dora Frank Guido, deceased; that B. F. Guido in offering or causing to be offered for probate said will, in accepting the appointment of executor thereof, in accepting Letters Testamentary, in receiving, appropriating and accepting the benefits under said will and by virtue of the contract expressed in said will, or for any one or more of such reasons, elected to take under the will of Dora Frank Guido, deceased and has thereby ratified and confirmed it and became thereby irrevocably bound by said agreement and contract to dispose of his estate, real, personal and mixed at his death in accordance with and in the same manner as provided by the terms and provisions of said agreement and contract evidenced by the will of Dora Frank Guido, deceased; that B. F. Guido died on or about June 14, 1957, leaving a written Last Will and Testament, dated July 3, 1951, hereinafter sometimes referred to as the 'subsequent will', which was admitted to probate in the Matter of the Estate of B. F. Guido, Deceased, No. A-29,461 in the Superior Court of the State of California in and for the County of Orange and also in the ancillary administration in the Estate of B. F. Guido, Deceased, No. 5626 in the County Court of Brazoria County, Texas; that the subsequent will of B. F. Guido, deceased, dated July 3, 1951, did not revoke the agreement and contract between Dora Frank Guido and B. F. Guido hereinafter established and enforced by this Judgment; that all persons interested in the estate of B. F. Guido, deceased, or claiming under

immediately prior to the filing of this Federal Court suit and

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the subsequent will of B. F. Guido, deceased, dated July 3, 1951, are bound by the prior agreement and contract between Dora Frank Guido and B. F. Guido hereinafter established and enforced by this Judgment and are estopped to assert any right or rights inconsistent with such agreement and contract between Dora Frank Guido and B. F. Guido; that Dora Frank Guido at the time of her death on September 16, 1949, was seized and possessed of a considerable estate, including as her own separate property and estate the following described land situated in Brazoria County, Texas, to-wit:

"An undivided one-half (1/2) interest in and to forty (40) acres of land, being the South Half of the North Half of the Southeast Quarter of Section No. 36, H.T. & B. R.R. Company Survey, Certificate No. 10/414, Brazoria County, Texas, same being more fully described in General Warranty Deed by B. F. Guido to Dora Frank Guido, dated February 27, 1934, now of record in Volume 246, Page 336 of the Deed Records of Brazoria County, Texas, to which deed and the record thereof reference is here made for all purposes;

"that B. F. Guido at the time of his death on June 14, 1957, was seized and possessed of a considerable estate, including the above described land which had been devised to and appropriated by him under the will of Dora Frank Guido; that said land above described was the subject of an Oil, Gas and Mineral Lease executed by Dora Frank Guido joined by her husband B. F. Guido et al., as Lessor, to Gillette Hill, as Lessee, dated May 1, 1934, now of record in Volume 249, Page 122 of the Deed Records of Brazoria County, Texas, and from which lease there has been production of oil, gas or other minerals by the said Lessee and its assignees continuously from a time prior to the date of death of Dora Frank Guido to the present time and the 'open mine' doctrine applies to the production, profits and royalties from said land and, consequently, the Plaintiffs are entitled thereto in accordance with the reciprocal and mutual wills established and enforced hereinafter by this Judgment.

"It is Accordingly Ordered, Adjudged and Decreed as follows:

"A. The agreement and contract for reciprocal and mutual wills entered into by Dora Frank Guido and B. F. Guido, both now deceased, as evidenced by the Last Will and Testament of Dora Frank Guido, deceased, dated December 3, 1942, now of record in Volume 702, Page 527 of the Deed Records of Brazoria County, Texas, is hereby established and enforced; the estate of B. F. Guido, deceased, including all property, real, personal and mixed, and wheresoever situated, is in all respects bound by and subject to the terms and provisions of said agreement and contract evidenced by said will of Dora Frank Guido, deceased, dated December 3, 1942; the estate of B. F. Guido, deceased, including all property, real, personal and mixed, and wheresoever situated, is hereby impressed with a trust in favor

after the state court judgment had become final,[5] the County Court of Brazoria County entered an order appointing plaintiff Louie A. Falsetti successor ancillary ad-

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of the beneficiaries and devisees under said agreement and contract evidenced by said will of Dora Frank Guido, deceased, dated December 3, 1942; the title to and possession of the estate of B. F. Guido, deceased, including all property real, personal and mixed, and wheresoever situated, is hereby divested from and out of those named as devisees and beneficiaries under the Last Will and Testament of B. F. Guido, deceased, dated July 3, 1951, and title to and possession of same is hereby vested in the beneficiaries and devisees under the agreement and contract between Dora Frank Guido and B. F. Guido, both deceased, as evidenced by the will of said Dora Frank Guido, deceased, dated December 3, 1942;

"B. Plaintiffs Stella Marie Lowman and Lawrence Gilbert Lowman are entitled to receive from and after June 14, 1957, the date of death of B. F. Guido, deceased, all of the production, profits and royalties from the forty (40) acres of land in Brazoria County, Texas, hereinabove described and attributable to the interest that was vested in the estates of Dora Frank Guido, deceased and B. F. Guido, deceased, respectively, and said Plaintiffs are entitled to receive same in accordance with the terms and provisions of the agreement and contract for reciprocal and mutual wills as evidenced by the will of Dora Frank Guido, deceased, dated December 3, 1942;

"C. The Defendants Doris C. M. Guido and Charles Leonard Short are hereby directed to deliver possession of any of the estate of B. F. Guido, deceased, now in their possession or which may come into their possession to Plaintiffs Stella Marie Lowman and Lawrence Gilbert Lowman;

"D. All costs in the above entitled and numbered cause shall be paid by Defendants Doris C. M. Guido and Charles Leonard Short, for which execution may issue;

"E. Plaintiffs Stella Marie Lowman and Lawrence Gilbert Lowman and the trustees named in the will of Dora Frank Guido, deceased, dated December 3, 1942, and their successors, and each of them, jointly and severally, shall have such writs as may be necessary or convenient to enforce this Judgment, including, but without limitation, writ or writs of possession; and;

"F. All relief prayed for by any of the parties to the above entitled and numbered cause not specifically granted herein is hereby denied.

"Entered and Signed this 18th day of October, A.D. 1960."

[5] No appeal or writ of error was ever perfected from the state court judgment by any person or parties to said suit, nor has there been any attempt to obtain equitable review in the Texas State Courts.

ministrator for certain limited purposes set forth in the order.*

The foregoing material facts led the court below to conclude, as previously stated, that the judgment of the Texas State Court was void because, (1) it was rendered in violation of Article 1982 Vernon's Civil Statutes Annotated; and (2) the judgment on its face reveals the necessity of administration in the Estate of B. F. Guido, and because plaintiff Doris C. M. Guido Falsetti, Administratrix, and a necessary party was dismissed prior to the entry of judgment.

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* Only those portions relevant to this matter are set out.

"In the County Court of Brazoria County, Texas.
Estate of B. F. Guido, Deceased.
No. 5626.

Order Appointing Successor Administrator With Will Annexed and Issuance of Letters Testamentary.

"It Is Further Ordered, Adjudged and Decreed that said Louie A. Falsetti, Applicant herein, receive letters testamentary, upon taking the oath required by law, and giving bond in the sum of Ten Thousand and no/100 ($10,000.00) Dollars; and when the said Louie A. Falsetti shall have qualified according to law, the Clerk of this Court shall issue letters in accordance with this judgment and the law, and that all other applications of other persons for the issuance of letters testamentary or for appointment as administrator or executor are hereby denied, and

"It Is Further Ordered, Adjudged and Decreed that the said Louie A. Falsetti, applicant herein, shall not take charge of, disburse, expend, dissipate or waste any of the assets of this estate, without prior approval of the Court until and unless the effect, if any, of the judgment in said Cause No. 39247, styled Stella Marie Lowman, et vir v. Doris C. M. Guido, et al., in the District Court of Brazoria County, Texas, upon this estate is determined by a Court of competent jurisdiction in accord with the provisions of the said authenticated copy of the Last Will and Testament of B. F. Guido, Deceased, but applicant, Louie A. Falsetti, shall have full power to bring or to defend any suit involving the assets of this estate or the effect, if any, of the said judgment in Cause No. 39247 upon this estate.

"Signed and Rendered this 6 day of June, 1961."

The defendants assert five theories in support of their contention that the State Court judgment is valid. First, Article 1982, V.C.S.A. was literally complied with; second, the judgment was regular on its face and contained absolute jurisdictional recitals; third, the state court had complete jurisdiction of the Brazoria County land and all interested parties; fourth, *res judicata;* and fifth, estoppel. Close scrutiny of Article 1932 is requisite to any decision upon the merits of the defendants' contentions.

The general rule regarding this section is that its provisions are mandatory, and that in every action against the estate of a decedent which involves title to land, the administrator, *if any*, and the heirs shall be made parties defendant. *Jones v. Gibbs*, 133 Tex. 645, 130 S.W. 2d 274 (1939); *Allan v. Matthews*, 210 S.W. 2d 849, 851 (1948). A failure to comply with Article 1982 will subject the proceedings to subsequent attack. *East v. Dugan*, 79 Tex. 329, 15 S.W. 273; *French v. French*, 148 S.W. 2d 930, writ dismissed.

Prior to the entry of the state court judgment, the Probate Court had dismissed the Administratrix (plaintiff Doris C. M. Guido Falsetti) and had refused to act on three successive applications seeking the appointment of a successor administrator. The Federal District Court had before it an affidavit of the Probate Judge (admitted in evidence over objection) stating that he had refused to appoint an administrator because he felt none was necessary. The plaintiffs urge that the actual necessity of an admin-

istrator is immaterial. They argue that the judgment remains void unless it shows on its face that no administrator was necessary. We are unable to agree with this position, although we do agree with the holding of the District Court that the requirements of Article 1982 are mandatory. The reasons for our conclusion follow.

It is necessary for us to examine the purpose or objective sought to be accomplished by Article 1982. We are of the opinion that this statute is primarily devoted to the meritorious objective of providing adequate *notice* to all parties who have an interest in, or may have an interest in, title to or ownership of real property comprising a decedent's estate. Compliance with the requirements of this Article will afford such interested parties an opportunity to present properly their claims against the estate in an expeditious, orderly manner. The administrator could then adequately represent the estate and defend against such claims when appropriate. The Article applies to real property. The law has always favored prompt, decisive vesting of title to real property, and the statute in question was apparently enacted with such objective in mind. Its purpose was accomplished when Mrs. Doris C. M. Guido Falsetti, as *ancillary administrator*, was made a party defendant. We do not feel the statute requires that an administrator remain a party defendant throughout the entire course of the litigation, including final judgment, unless circumstances

reasonably warrant it.[7] In the instant case, the administratrix was made a party to and participated in the suit in one capacity or another for approximately two years.[8]

It is interesting to note that in *O'Connor v. O'Connor*, (5 Cir. 1963), 315 F. 2d 420, this Court refused to review the judgment of a Texas State Court which held in effect that it was not necessary under Texas law that a party be sued in his representative capacity as executor for an accounting and for the appointment of a receiver where he had refused to account when called upon to do so. The District Court in its opinion reported in 215 F. Supp. 420, cited no case to the effect that the dismissal of the ad-

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[7] Sec. 37 of the Texas Probate Code provides:

"When a person dies, leaving a lawful will, allof his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject, however, to the payment of the debts of the testator or intestate, except such as is exempted by law; and whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exception aforesaid shall still be liable and subject in their hands to the payment of the debts of the intestate; but upon the issuance of letters testamentary or of administration upon any such estate letters testamentary or of administration upon any such estate, the executor or administrator shall have the right of possession of the estate as it existed at the death of the testator or intestate, with the exception aforesaid; and he shall recover possession of and hold such estate in trust to be disposed of in accordance with law. Acts 1955, 54th Leg., p. 88, ch. 55."

Title does not vest in the representative or the estate.

A distinction is therefore drawn between heirs or devisees and the representative. The statute apparently recognizes that there are circumstances under which such representative would or could not be made a party defendant. For example, adverse action of the representative or conduct of the representative as a basis for estoppel. See *Berry v. Hindman*, (C.A.) 129 S.W. 1181, err. ref.

[8] The dismissed administratrix was actually retained in the suit in her individual capacity, but was dismissed in her representative capacity upon motion of Stella Marie Lowman in February 1960 for failure of said representative to discharge her duties as such.

ministrator (trix) renders a judgment against a decedent's estate void. Nor have we been cited any case law to that effect by the plaintiffs.

The rule in the law of judgments is that a judgment of a domestic court of general jurisdiction, rendered in the exercise of its usual powers, and regular on its face, imports absolute verity. 34 Tex. Jur. 2d, § 325. When such a judgment is collaterally attacked, every reasonable presumption that may be necessary to uphold it will be indulged, the existence of the necessary jurisdictional facts will be presumed, and it will be presumed also that in rendering the judgment, the court complied with all the mandatory provisions regulating its exercise of power. 34 Tex. Jur. 2d id., *Manifee v. Hamilton*, 32 Tex. 496; *Houston Oil Co. v. Bayne*, (C.A.) 141 S.W. 544 err. ref. A collateral attack *may* fail even though the record affirmatively discloses a postive defect in a jurisdictional matter; some presumption may be applicable that will overcome the defect. 34 Tex. Jur. 2d § 344.

The Texas case of *Williams v. Took*, 116 S.W. 2d 1114 (Ct. Civ. Apps. Texarkana 1938) held that the absence of an allegation in the complaint that no administration was pending or necessary does not overcome the presumption of verity attaching to the judgment of every court of competent jurisdiction. The Texas Court there stated:

> "In Freeman on Judgments (5th Ed.) vol. 1, p. 819, § 383, it is said:
>
> "To conclude from a mere want or insufficiency of jurisdiction recitals in the record of a court of general

> jurisdiction that jurisdiction was not actually acquired would be, in effect, to presume against the record, whereas it is a rule of general application that every intendment consistent with the record of such courts will be indulged to sustain their proceedings and judgments. The rule is that upon collateral attack of a domestic court of general jurisdiction the want of jurisdiction or invalidity of the judgment must affirmatively appear upon the record itself, and until the contrary appears it will be presumed that the court had jurisdiction. Nothing will be intended to be out of the jurisdiction of a court of general jurisdiction but that which expressly appears to be so. The absence from the record of the necessary jurisdictional facts, will not overcome the presumption of jurisdiction, and that papers which ought to have been included in the judgment-roll are missing therefrom is not enough to make it affirmatively appear that the court had no jurisdiction. In the absence therefore, of any showing in the record either one way or the other, a presumption arises in favor of the validity of the judgment of a court of general jurisdiction, and the existence of all matters going to the power of the court or tribunal to render the judgment.
>
> *'Every fact will be presumed to have existed that was necessary to jurisdiction, over the subject matter or the parties.'"* (emphasis added.)

An application to the Supreme Court of Texas for a writ of error was denied. The parties attacking the judgment then filed a suit in the Federal District Court contending that the refusal to declare the earlier judgment void amounted to a denial of due process. The Federal District Court dismissed the complaint for lack of jurisdiction, and this Court affirmed in 108 F. 2d 759 (1940) stating:

> "The purpose of the suit is clearly to seek a review of the decisions of the Texas courts and the reversal

> of those decisions for error. The jurisdiction of the District Court is strictly original. It has no jurisdiction to reverse or modify the judgment of a state court. The errors complained of could be reviewed only by the Supreme Court. Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362. It was the duty of the District Court to dismiss the suit. 28 U.S.C.A. § 80."

We are unable to detect any injury to plaintiff Doris C. M. Guido Falsetti resulting from her dismissal as ancillary administratrix. She was at all times a party to the proceedings in *some* capacity. She was represented by counsel, and was the real party in interest throughout the proceedings. It would be extremely difficult to maintain that she did not have adequate notice and an opportunity to protect her interests. It is true that Mr. Falsetti was appointed successor administrator after the rendition of the state court judgment, and after it became final. Mr. Falsetti was, by court order, limited in his administrative capacity in certain respects, but he was also empowered to take any legal action necessary to "bring or defend any suit involving the assets of this estate, or the effect, if any, of the said judgment in Cause No. 39247 [Stella Marie Lowman, et vir, vs. Doris C. M. Guido, et al.] upon this estate." Such action would also include the filing of a Bill of Review by an administrator.

We are unable to agree with the learned District Court that the state court judgment "shows on its face" that it is void for want of an indispensable party, is subject to collateral attack in the U. S. Courts, and that it "has no effect whatsoever." We feel that the state court judge was entitled

to consider the facts and circumstances surrounding the conduct of Mrs. Falsetti when she was serving as Administratrix; the appearance in court of the real parties in interest; the fact that Mrs. Falsetti, in her capacity as Administratrix, was a party during much of the state court litigation; and the several assertions in the record by Mrs. Falsetti to the effect that the probate proceedings in California had been completed and no debts were left unpaid. The state court judgment was subject to attack in Texas state courts by a Bill of Review, or by appeal to higher state courts. Neither remedy has been sought in the state courts.

Having thus determined that the state court judgment was valid, it is unnecessary to pass upon the existence of a contractual will executed by B. F. Guido, or an agreement by him to execute a will.

In reaching our conclusion in this case, we have not suggested the application of the doctrine of abstention. Although mindful of the myriad decisions and law review articles on the subject of abstention,* we have given full consideration to the contentions of the properties in this case. A substantial argument might support the application

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* *Railroad Comm'n. v. Pullman*, 312 U.S. 496, 85 L. Ed. 971 (1941); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960); *United Services Life Ins. Co. v. Delaney*, 328 F. 2d 483 (5 Cir. 1964), cert. den. 32 L.W. 3400 (May 19, 1964); *Inter Jurisdictional Certification, Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. Pa. L. Rev. 344 (June 1958); *Abstention and Certification in Diversity Suits; "Perfection of Means and Confusion of Goals,"* 73 Yale Law Journal 850 (1964); *Certification of Questions from Federal Appellate Courts to Florida Supreme Court and its Impact on the Abstention Doctrine*, 36 Tul. L. Rev. 571 (April 1962).

of the doctrine in consideration of the recognized public policy of maintaining a proper balance in the delicate field of Federal-State relations. We are cognizant of the duty of Federal Courts in proper jurisdictional circumstances, to pass upon questions of state law when necessary to the rendition of an appropriate judgment. Even so, Federal Courts should be extremely reluctant to declare null and void the solemn judgments of state courts of record when the record reflects mature and careful consideration by state courts of the legal problems presented. Indeed, all courts—state and federal—should proceed with caution and respectful restraint when requested to declare as a matter of law, that the judgments of another court of record are void on their face. The law supplies strong presumptions in support of the validity of such judgments and they should not be set aside on purely hypertechnical grounds, or for light and trivial reasons.[10]

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[10] See *Williamson v. Puerifoy*, 316 F. 2d 774 (5 Cir. 1963), wherein this Court quoted with approval the following language of the District Judge when that case was before the District Court:

> "In the first place, the State courts are older than the Federal courts. They were here administering justice and functioning between litigants for 150 years before the Federal Government was organized. When the Constitution was written and adopted these State courts were not abolished nor subordinated to the national courts created by the Constitution of the new nation. The national courts have jurisdiction only of those things conferred upon them by law. And at the time of the creation of the national courts and at time of writing the Constitution itself the State courts were kept as a separate and distinct judicial institution. *As a result all cases that originate in the State court must be appealed to an appellate court of the State and thence to the Supreme Court of the State.* All cases originating in the United States court must be appealed to the Circuit Court of the United States or to the Supreme Court of the United States. Nowhere has a Federal trial court been given supervisory or appellate jurisdiction over State judges." (emphasis added)

We are, therefore of the opinion that the District Court was in error and the judgment is REVERSED and the cause REMANDED with instructions to enter judgment in favor of the defendants.

TUTTLE, Chief Judge, SPECIALLY CONCURRING:

I concur in the result and in all that is said that is relevant to our decision. I write this brief concurring opinion only because I think that what is said about abstention is not appropriately a part of this opinion, and because I disagree with the major implications contained in the discussion of this subject. I can not conceive of our giving serious thought to abstaining in this case. I am not persuaded that we are not still guided in this area of the law by *Meredith v. Winter Haven*, 320 U.S. 228.

BROWN, Circuit Judge, SPECIALLY CONCURRING:

In view of the Chief Judge's special concurrence, I think that the question of abstention and the principles invoking it so recently discussed by the full Court in *United Services Life Ins. Co. v. Delaney*, 5 Cir., 1964, *en banc*, 328 F. 2d 483, cert. denied, 1964, ... U.S. ....., ...S. Ct. ....., 12 L. Ed. 2d 298, should be deferred to a situation directly presenting the problem.